JD(SF)–73–04
Mira Loma, CA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SAN FRANCISCO BRANCH OFFICE
DIVISION OF JUDGES

CENTRAL FREIGHT LINES, INC.

and Case 21-CA-36156

JOSEPH MICHAEL TOVAR

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DECISION

Statement of the Case

JAY R. POLLACK, Administrative Law Judge: I heard this case in trial at Los Angeles, California, on August 18-20, 2004. On February 4, 2004, Joseph Michael Tovar (Tovar) filed the original charge alleging that Central Freight Lines, Inc. (herein called Respondent) committed certain violations of Section 8(a)(3) and (1) of the National Labor Relations Act, as amended (29 U.S.C. Section 151 et seq., herein called the Act). On May 3, 2004, Tovar filed an amended charge against Respondent. On May 12, 2004, the Regional Director for Region 21 of the National Labor Relations Board issued a Complaint and Notice of Hearing against Respondent, alleging that Respondent violated Section 8(a)(3) and (1) of the Act by discharging employee Tovar because he engaged in union activities or other protected concerted activities. Respondent filed a timely answer to the complaint, denying all wrongdoing.

The parties have been afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. Upon the entire record, from my observation of the demeanor of the witnesses,[1] and having considered the briefs submitted by the parties, I make the following:

[1] The credibility resolutions herein have been derived from a review of the entire testimonial record and exhibits, with due regard for the logic of probability, the demeanor of the witnesses, and the teachings of *NLRB v. Walton Manufacturing Company*, 369 U.S. 404, 408 (1962). As to those witnesses testifying in contradiction to the findings herein, their testimony has been discredited, either as having been in conflict with credited documentary or testimonial evidence, or because it was in and of itself incredible and unworthy of belief.

Findings of Fact and Conclusions

I. Jurisdiction

Respondent is a Texas corporation, with an office and place of business in Mira Loma, California, where it is engaged in business as an interstate common carrier. During the 12 months prior to issuance of the complaint, Respondent derived revenues in excess of $50,000 for the transportation of freight from California directly to points outside the State of California. Accordingly, Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

II The Alleged Unfair Labor Practices

A. The Facts

Respondent operates a "union-free" company. The Respondent proclaims that status in its employee handbook including the statements, “You’ve joined a union-free team committed to success” and “Central Freight Lines, Inc. is a non-union company.” The handbook further states “unions often bring trouble” and that, "It is, therefore, our positive intention to oppose unionism by every proper means, and, in particular by fair treatment to our employees."

Joseph Michael (Mike) Tovar was hired on November 30, 2003, as a part-time dockworker and yard hostler. There were approximately 20-30 dockworkers on Tovar’s shift. In addition there were two yard hostlers. Tovar was the only dockworker that also performed hostler duties.[2] Tovar’s shift usually began at 5 p.m. on Monday through Friday and at 7 a.m. on Sundays. Tovar worked between 5 and 10 hours a shift depending on the workload. Tovar would check with dock supervisor Richard Martinez at the end of each shift to find out when he should report next for work.

Tovar testified that during his employment with Respondent, Richard Martinez, his immediate supervisor, frequently praised his work. In December 2003, William Kincaid, terminal manager, also praised Tovar’s work. Gloria Martinez, [3] then a clerk at the Mira Loma facility also testified that Richard Martinez frequently praised Tovar’s work. Gloria Martinez further testified that her supervisor Mark Selby, dispatcher, also praised Tovar’s work.

Tovar testified that he has been a member of the Teamsters Union since December 2002. In December 2003, Tovar had a conversation with an employee named Brian in which Tovar pointed out graffiti stating, “Central Freight Sucks. Let’s Go Union.” Tovar asked, “How come you guys haven’t gone union yet? I’m a Teamster.” Brian told Tovar that Tovar should not be saying such things. Shortly thereafter, Tovar had a conversation with a yard hostler named Jim at the end of their shift. Tovar asked why the employees “had not gone union yet?” Jim responded that Tovar should be quiet about the matter.

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[2] Dockworkers primarily load and unload trailers. Hostlers primarily drive tractor-trailers to and from the docks and organize them in the yard.

[3] Gloria Martinez is not related to Richard Martinez. Gloria Martinez now works as a clerk at Respondent’s Tustin, California, terminal. During Tovar’s employment with Respondent he was living with Gloria Martinez. The couple separated in May 2004. Richard Martinez no longer works for Respondent and was not available to Respondent as a witness.

During early January 2004, prior to Tovar's termination, Gloria Martinez, employee Jim Melton and supervisor Mark Selby were discussing Selby's anticipated transfer to Respondent's new facility in Tustin, California. Selby said that he was glad to be transferring because Respondent might shut down the Mira Loma facility. When Gloria asked why Respondent would close the Mira Loma terminal, Selby stated, "There were rumors going around the dock that some employees are talking about going union and [Respondent] would never let that happen. They would shut the terminal before they ever let a union in there." Selby then stated that Respondent had closed another terminal due to the union.

On January 6, 2004, Tovar was experiencing pain in his shoulder. He notified Richard Martinez about his shoulder injury and completed his work shift. At the end of Tovar's shift, Richard Martinez told Tovar that the employee could take the next day off, if his shoulder was still bothering him. Richard and Tovar agreed that Tovar would call Richard and notify him of Tovar's availability.

On January 7 Tovar called Martinez and stated that his shoulder was still bothering him. Richard told Tovar to take the night off and to call him the next day. Later that day, Richard Martinez asked Gloria Martinez how Tovar was feeling and Gloria stated that Tovar's shoulder was still causing Tovar pain. On January 8, Tovar called the terminal to find out when to report to work. Dock supervisor Tom Hancick told Tovar that Richard Martinez was not at work that day. Hancick told Tovar that work was slow and that Tovar should call Richard Martinez the next day.[4]

On Friday, January 9, Tovar again called Respondent's terminal to find out when to report to work. Hancick told Tovar that work was slow and that since the terminal was closed on Saturday, Tovar should come to work on Sunday. Tovar arrived early on Sunday January 11. Richard Martinez told Tovar that Tovar could not clock into work. When Tovar asked why, Richard Martinez answered that he didn't know. Richard Martinez told Tovar that according to Kincaid, Tovar had to first speak with Kincaid. When Tovar questioned why he had to speak with Kincaid, Richard Martinez said he didn't know but that Tovar had to speak with Kincaid before he could work. Kincaid was not at work that day. Tovar asked Larry Leos, assistant terminal manager, why he had to talk to Kincaid before he could work. Leos was unfamiliar with the situation and Tovar explained what had occurred since January 6. Leos said that he knew nothing of the situation and would discuss the matter with Kincaid. Leos promised to call Tovar in a day or two.[5]

On Monday, January 12, Tovar called Respondent's facility but was unable to reach Kincaid. On January 13 and 14, Tovar also called Kincaid but was unable to reach him. Tovar left messages with an office employee on each of these occasions. On Thursday, January 15, after not hearing from Leos or Kincaid, Tovar visited the Mira Loma terminal and spoke with Kincaid. Tovar asked about coming back to work and Kincaid stated that he did not know about the situation and that he would speak to Richard Martinez, Hancick and Leos. Kincaid promised to call Tovar after speaking with the supervisors.

On January 21, after not hearing from Kincaid, Tovar went to Kincaid's office. Kincaid said that he had not yet had an opportunity to discuss Tovar's situation with Richard Martinez,

[4] Hancick, still employed by Respondent as a supervisor, was not called to testify by Respondent.

[5] Leos still employed by Respondent as a supervisor, did not testify at the hearing.

Leos and Hancick. Kincaid again promised to talk to the supervisors and then call Tovar. Kincaid never did call Tovar.

During the week of January 19, Gloria Martinez asked employee David Ortega if Ortega could find out why Respondent was not giving work to Tovar. Shortly thereafter, Ortega asked Richard Martinez where Tovar was. Richard Martinez responded that he was not permitted to use Tovar anymore. Ortega asked why and Richard Martinez replied, "He has been attending union meetings." Ortega went back to work. Ortega reported this conversation to Gloria Martinez. Gloria Martinez asked Ortega to put his account of the conversation in writing. On January 24, Ortega dictated and signed a statement affirming, "When I approached a dock supervisor at Central Freight Lines to inquire [why Tovar was not working], I was told, "He was attending union meetings." [6] On Monday January 26, Ortega gave the written statement to Gloria Martinez. Ortega testified at the hearing that he observed that Respondent hired approximately 12 new dockworkers in January after it discharged Tovar. Respondent offered evidence that there was a great deal of turnover amongst its dockworkers during this time period.

On January 22, Gloria Martinez told Tovar of Richard Martinez's comment to Ortega that Tovar couldn't work because he was attending union meetings. Thereafter, Tovar ceased his attempts to return to work at the Mira Loma facility.

As will be seen below, Respondent contends that Tovar was absent for work on three occasions: December 10 and 14, 2003, and January 7, 2004. Tovar credibly testified that he was sick with the flu on December 10, 2003. Tovar called more than two hours prior to the start of his shift and notified Richard Martinez that he was sick. Martinez told Tovar to call back the next day. Tovar called back on December 11 and worked that day. Neither Martinez nor any other supervisor informed Tovar that this absence was not approved. A week prior to his absence on December 14, 2003, Tovar asked Richard Martinez if he could report late for work on December 14. Martinez told Tovar to take the day off. Accordingly, Tovar did not work that day. Neither Martinez nor any other supervisor ever notified Tovar that this absence was not approved. As stated earlier, on January 6, 2004, Tovar told Richard Martinez about his shoulder injury. Tovar finished that shift. He called Martinez on January 7 and was told he could have that night off. Neither Martinez nor any other supervisor ever advised Tovar that this absence was not approved. Although Tovar called Respondent and visited the terminal, he was never told that he had unexcused absences. Not only was Tovar never told why he was discharged; he was in fact never even told that he was discharged.

Gloria Martinez and Selby transferred to Respondent's new terminal in Tustin, California at the beginning of February 2004. On Gloria Martinez's last day at the Mira Loma facility she said goodbye to Richard Martinez. Richard said that he would miss her. Gloria said that she and Tovar knew that it was not Richard's fault that Tovar was no longing working for Respondent. Richard said he was sorry and told Gloria that Tovar could use him for a job reference. Hancick walked nearby and Richard ended the conversation.

In late February after Selby and Gloria Martinez had transferred to the Tustin terminal, Gloria Martinez had a conversation with Selby in which she accused him of causing Tovar's termination. Gloria told Selby that there were rumors that Selby had told Kincaid that Tovar had discussed a union with another employee. Selby answered that the dockworkers did not like

[6] Ortega testified that the dock supervisor referred to in his January 24 statement was Richard Martinez.

him and that the rumors were not true. Selby said that whomever Tovar talked with was the person that reported to Kincaid.

In May 2004, Selby asked Gloria Martinez whether Tovar had found another job. Gloria answered that Tovar was still looking for work. Selby said he could speak to the terminal manager at the Tustin facility on Tovar's behalf. Gloria asked whether the decision was up to Kincaid. Selby then asked whether there was a lawsuit between Tovar and Kincaid. Gloria answered that she didn't know and that she wanted to stay out of it. Selby responded that he understood and that Kincaid had told him to say that he did not know anything about Tovar.

In August 2004, shortly before the instant trial, Selby, after a telephone conversation with Kincaid, told Gloria Martinez that Selby was going to be subpoenaed for "Mike's case." Selby explained that he was being subpoenaed because he had said, "The terminal would close down if it went union." Selby said, "That is just my opinion." Selby continued, "The dockworkers are asking me if the terminal is going to close down and it is my opinion, yeah. I think the company would close it down and they would shut the terminal down, because they did it to Denver and they did it to Nevada." At the hearing, Selby did not deny making any of these statements to Gloria Martinez. Selby did testify that whenever he spoke about he union, he indicated to employees that he was stating his personal opinion.

Respondent's Defense

Respondent maintains an attendance policy, which provides for attendance standards and corrective action. The employee handbook states "Employees who receive two final written warnings or two no call/no shows within a 12-month period or three occurrences within their first ninety days of employment will be subject to termination of employment." Respondent contends that Tovar accumulated four occurrences within his first ninety days of employment.

Pursuant to the handbook, an employee is charged for one occurrence if he is absent with notice, but with no approval. An absence without notice or approval (a no call/no show) counts for two occurrences. An employee who is absent but with notice and approval is not charged for an occurrence. The handbook does not express what constitutes adequate notice. As set forth above, Tovar testified that he requested and received approval for all three of his absences. No witness with knowledge contradicted this testimony. Instead, Respondent offered certain questionable documents purporting to establish that Tovar had accumulated four occurrences for these three absences.

I first discuss the alleged "Employee Probationary Performance Evaluation" form, which Respondent contends was a January 8, 2004, recommendation to discharge Tovar. The form signed by Larry Leos, assistant terminal manager, and Bill Kincaid, terminal manager, was clearly backdated. The form states, in Kincaid's handwriting: "Has 4 occurrences within 28 days of employment. Had 1 no call no show in violation of attendance policy. Falsification of employment history." I find that this document was postdated because Respondent did not learn of any alleged falsification of Tovar's employment history until March 14, 2004.

On March 14, 2004, Respondent's human resources department received a fax, which contradicted the length of Tovar's prior employment with Wal Mart.[7] This fax was in response to a request from Respondent's human resources department on February 13, 2004, after Tovar had already been terminated by Respondent. I do not credit Kincaid's speculation as to why Respondent's human resources department attempted to investigate Tovar's employment history after he was terminated. No one from Respondent's human resources department testified. I draw the inference that the inquiry was made in a belated attempt to justify the termination of Tovar.[8] Kincaid could not explain the January 8 reference to Tovar's employment history, the knowledge of which was not obtained until March 2004. Further, Leos did not testify. I draw the inference that Leos' testimony would not have been favorable to Respondent's case.[9]

In addition, the backdated employee evaluation makes negative comments about Tovar's job knowledge, quality of work, attendance and adherence to company policies. The credible evidence shows that during Tovar's employment with Respondent, supervisors Martinez, Kincaid and Selby praised his work. Even after Kincaid discharged Tovar, Selby sought to have Tovar hired at the Tustin facility. I find these negative comments in the evaluation further evidence that Respondent was attempting to justify the termination of Tovar, after the fact.

On March 4, 2004, Respondent's Mira Loma facility sent to its corporate payroll department a form showing that Tovar had voluntarily quit his employment. This document signed by Leos states that Tovar voluntarily terminated his employment for "other employment" on January 6. I find this document to be further evidence that the employee evaluation (falsely dated January 8) was a recent fabrication.

Furthermore, Kincaid testified that records concerning an employee's attendance are not computerized and that there was no triggering device to bring Tovar's alleged attendance violations to his attention. Kincaid never explained how he obtained notice of Tovar's alleged

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[7] Tovar testified that the report stating he had only worked for Wal Mart for two months was incorrect. According to Tovar he worked for Wal Mart for two years. I credit Tovar's testimony over the uncorroborated hearsay stating that Tovar only worked for Wal Mart for two months. In any event Respondent did not learn of this unproven falsification by Tovar until at least two months after Tovar had been terminated. Thus, the alleged falsification could have had nothing to do with the employee's discharge.

[8] When a party has relevant evidence within his control, which he fails to produce, that failure gives rise to an inference that the evidence is unfavorable to him. An inference may even be warranted that the material which the party refuses to show supports exactly the opposite of what he contends at the hearing. *National Football League*, 309 NLRB 78, 97-98 (1992). I draw an adverse inference against Respondent due to its failure to call any witness or present any documents to explain its actions in investigating Tovar's employment history after the employee was terminated.

[9] When a party fails to call a witness who may reasonably be assumed to be favorably disposed toward the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge. *International Automated Machines*, 285 NLRB 1122, 1123 (1987. In *NLRB v. Shelby Memorial Hospital Assn.*, 1 F.3d 550, 553 (7th Cir. 1993), the court stated, "The failure of an employer to produce relevant evidence particularly within its control allows the Board to draw an adverse inference that such evidence would not be favorable to it." I draw an adverse inference against Respondent due to its failure to call Leos as a witness to explain the discharge and the discrepancies in the alleged employee evaluation.

attendance violations. The only other probationary employee discharged for attendance at the Mira Loma terminal had between 12-16 occurrences before he was terminated.[10]

The falsification of the employee evaluation is particularly significant. Finders of fact should be extremely sensitive in unfair labor practice litigation involving credibility disputes, to situations where the proof affirmatively shows, as here, Respondent's creation of false documentation. *WordsWorth*, 307 NLRB 372 (1992); *Quebecor Group, Inc.*, 258 NLRB 961, 972 (1981). Even more so in the presence of a failed obligation to produce a witness (Leos or anyone from the human resources department) under its control, with knowledge of the facts, where there is a prima facie case of the witness' creation of a false document used in the subsequent discipline of an employee engaged in union activities. See *International Automated Machines*, 285 NLRB 1122 (1987). Accordingly, I find the performance evaluation form not only to be backdated but also a falsification in an attempt to justify Tovar's termination.

While there was no evidence that Tovar received any warnings concerning his alleged attendance occurrences, Respondent produced a calendar and lined sheet of paper showing that Tovar was charged with an occurrence on January 7. However, no witness was produced to authenticate this document and no witness contradicted Tovar's testimony that Martinez had approved the absence. Respondent also produced another lined sheet of paper purporting to show that Tovar was a no/no show on December 10, 2003, and had accumulated an occurrence on December 14. No witness was produced to authenticate this document and there is no evidence as to who made these written notations. Apparently the above notations were not made by Martinez, Tovar's supervisor. Finally, a document, which appears to be a roster from December 10, 2003, shows that Tovar was marked down as a no call/no show. The notation was not made by Martinez who apparently did not report to work until later that shift. However, Respondent could not identify which supervisor made that notation. No one from Respondent ever mentioned the alleged no call/no show to Tovar. In view of the false documentation mentioned above, the suspicious nature of these notations, and the failure of Respondent to call any witness with knowledge to corroborate this evidence, I do not credit any of these notations of alleged attendance violations. At best, the roster for December 10, 2003, shows a mistaken belief that Tovar had not asked for and received approval for his absence. However, even if Tovar was legitimately charged with two "points" or "occurrences" for the December 10 absence, that would not establish a violation of Respondent's attendance policy.[11] Based on Respondent's false employee evaluation and other suspicious documents, I am reluctant to give credit to the December 10 roster, without corroboration.

Respondent argues that it has a non-discriminatory attendance rule for probationary employees. Certainly, an attendance policy for employees, especially probationary employees, is important to Respondent. However, Respondent has not shown any connection between the discharge of Tovar and these serious attendance concerns. Rather, it appears Respondent has attempted to falsify records and mischaracterize excused absences in an attempt to justify Tovar's discharge.

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[10] While Respondent's records show some probationary employees discharged at other facilities were discharged with only four occurrences, the records show that in a majority of the cases involving the discharge of probationary employees for attendance reasons, the employees were given warnings prior to discharge and were permitted in excess of four occurrences.

[11] Had Tovar been charged with a no call/no show on December 10, surely a supervisor would have mentioned this serious offense to Tovar.

B. Conclusions

The credible evidence establishes that when David Ortega asked dock supervisor Richard Martinez why Tovar was not working at the loading dock, Martinez answered that Tovar "was attending union meetings." I find this statement tantamount to a confession that Respondent took punitive action against Tovar because Respondent believed he was engaging in union activities. Not only is such a statement evidence of hostility toward Tovar because of his perceived protected activity, but also it constituted an outright confession of Respondent's intention to retaliate against Tovar because it believed he supported a union. *American Petrofina Company of Texas*, 247 NLRB 183 (1980); See, e.g., *NLRB, v. L.C. Ferguson and E.F. Von Seggern d/b/a Shovel Supply Company*, 257 F.2d 88, 92 (5th Cir. 1958), and *NLRB v. John Langenbacher Co., Inc.*, 398 F.2d 459, 463 (2d Cir. 1968), cert. denied 393 U.S. 1049 (1969). "The Courts pay special attention to such statements against interest when in the unusual case it occurs that a party admits that its conduct, otherwise ambiguous, is for improper purpose or objective." *Brown Transport Corp. v. NLRB*, 334 F.2d 30, 38 (5th Cir. 1964). Such conduct restrains and coerces employees in the exercise of the right to select a bargaining representative of their own choice. See *Winges Company, Inc.*, 263 NLRB 152 (1982): *A & A Ornamental Iron, Inc.*, 259 NLRB 1019 (1982). See also *San Souci Restaurant*, 235 NLRB 604 (1978): *Bell Burglar Alarms, Inc.*, 245 NLRB 990 (1979).

The credible evidence establishes that in early January 2004, Mark Selby, dispatcher, stated to Gloria Martinez that Respondent would shut down the facility before it would let the union in. Selby declared that Respondent had shut down another facility because of the union. Such conduct restrains and coerces employees in the exercise of the right to select a bargaining representative of their own choice. See *Winges Company, Inc.*, 263 NLRB 152 (1982): *A & A Ornamental Iron, Inc.*, 259 NLRB 1019 (1982). See also *San Souci Restaurant*, 235 NLRB 604 (1978): *Bell Burglar Alarms, Inc.*, 245 NLRB 990 (1979). Shortly before the instant hearing, Selby told Gloria Martinez that it was his opinion that Respondent would close a facility to avoid a union and that Respondent had closed facilities in Denver and Nevada because of the union.

Respondent argues that Selby's statements are opinions protected by Section 8(c) of the Act. I conclude otherwise. While Selby may have used the word "opinion" he stated as a fact that Respondent had closed other terminals to avoid unionization. Such statements clearly convey the threat of retaliation against employees for engaging in union activities. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969). I therefore find that it was outside the bounds of Section 8(c), coercive and violative of Section 8(a)(1).

In *Wright Line, A Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989, the Board announced the following causation test in all cases alleging violations of Section 8(a)(3) or violations of 8(a)(1) turning on employer motivation. First, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Upon such a showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. The United States Supreme Court approved and adopted the Board's *Wright Line* test in *NLRB v. Transportation Corp.*, 462 U.S. 393, 399-403 (1983).

Respondent contends that Tovar did not engage in union activities and that it had no knowledge of Tovar's union membership. Such contentions are irrelevant. It is well settled that a discharge motivated by a mistaken belief that an employee engaged in union and/or protected concerted activity is violative of Section 8(a)(1) and/or (3) of the Act. *Salisbury Hotel*, 283 NLRB 685 (1987); *Magnolia Manor Nursing Home*, 260 NLRB 377 (1982); *Metropolitan Orthopedic*

Associates, 237 NLRB 427 (1978); *Henning & Cheadle, Inc.*, 212 NLRB 776 (1974); *System Analyzer Corp.*, 171 NLRB 45 (1968).

For the following reasons, I find that General Counsel has made a strong prima facie showing that Respondent was motivated by unlawful considerations in discharging Tovar. In addition to Richard Martinez's admission of Respondent's retaliation against Tovar because it believed he supported a union, the evidence establishes a strong case of discrimination. Tovar gave notice and received approval for each of his absences. Respondent never warned Tovar about his alleged attendance problems or even mentioned attendance to him. Even after Respondent determined to discharge Tovar or to cease utilizing his services, it never mentioned his alleged absences. Tovar was never given a reason for his termination. In fact, he was never told that he was terminated. When Ortega questioned why Tovar was no longer working for Respondent, Richard Martinez, Tovar's supervisor, told Ortega that Tovar had been attending union meetings. Thus, the only supervisor who gave a reason for the discharge declared that it was based on Tovar's perceived union activities. When Gloria Martinez questioned Selby about Selby's participation in Tovar's termination, Selby stated someone else must have told Kincaid about Tovar's union activity. Selby did not deny that Kincaid's knowledge of Tovar's union related conversation had led to Tovar's termination. Although Selby spoke with Gloria Martinez several times about Tovar and even expressed a desire to hire him for the Tustin facility, Selby never mentioned any attendance problems.

Further buttressing General Counsel's case is the fact that Respondent backdated the alleged recommendation of termination. Respondent produced a document allegedly from Tovar's personnel file dated January 8, 2004, which could not have been written prior to April 2004. The document asserted along with alleged absenteeism, that Tovar had falsified his employment application. However, Respondent did not learn of this alleged falsification until April 2004. In fact, Respondent did not even attempt to verify Tovar's employment history until well after a month after it terminated him (and after Tovar had filed the instant charge). In March of 2004, Respondent's records still showed Tovar as having been a voluntary termination. Moreover, in spite of the record that shows supervisors Martinez, Kincaid and Selby considered Tovar a very good employee, Kincaid and Leos gave Tovar negative grades on the backdated termination request.[12]

The burden shifts to Respondent to establish that the same action would have taken place in the absence of Tovar's perceived union activities. Respondent has not met its burden under *Wright Line*. Its assertion that it had a rule regarding absences by probationary employees is not sufficient to overcome the prima facie case. An employer cannot carry its *Wright Line* burden simply by showing that it had a legitimate reason for the action, but must "persuade" that the action would have taken place even absent the protected conduct "by a preponderance of the evidence." *Centre Property Management*, 277 NLRB 1376 (1985); *Roure Betrand Dupont, Inc.*, 271 NLRB 443 (1984)). In other words, the mere presence of legitimate business reasons for disciplining or discharging an employee does not automatically preclude the finding of

[12] As stated earlier, finders of fact should be extremely sensitive in unfair labor practice litigation involving credibility disputes, to situations where the proof affirmatively shows, as here, Respondent's creation of false documentation. *WordsWorth*, 307 NLRB 372 (1992); *Quebecor Group, Inc.*, 258 NLRB 961, 972 (1981) Even more so in the presence of a failed obligation to produce a witness (Larry Leos or someone from Respondent's human resources department) under its control, with knowledge of the facts, where there is a prima facie case of the creation of a false document used in the subsequent discipline of an employee engaged in union activities. See International Automated Machines, 285 NLRB 1122 (1987).

discrimination. *J.P. Stevens & Co. v. NLRB*, 638 F.2d 676, 681 (4th Cir. 1981). Beyond that, "when a respondent's stated motive for its actions are found to be false, the circumstances may warrant an inference that the true motive is an unlawful one that the respondent desires to conceal." *Fluor Daniel, Inc.*, 304 NLRB 970, 970 (1991). See also *Shattuck Denn Mining Co. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966). Here, while it has been shown that Respondent had a rule regarding absences by probationary employees, there has been no credible evidence that Tovar violated that rule. Rather, the evidence shows that Tovar's attendance record was not the real reason for the discharge. Finally, analysis of Kincaid's testimony shows that it cannot be relied upon to show any legitimate reason for the termination of Tovar. Where, as here, General Counsel makes out a strong prima facie case under *Wright Line*, the burden on Respondent is substantial to overcome a finding of discrimination. *Eddyleon Chocolate Co.*, 301 NLRB 887, 890 (1991). Respondent has failed to sustain its burden.

Although an employer has a wide degree of discretion with respect to its decision to discharge a probationary employee, an employer is not entitled to terminate a probationary employee for discriminatory reasons. It is well established that probationary employees are entitled to the full protection of the Act. See *General Battery Corp.*, 241 NLRB 1166, 1174 (1979). *Phillips Petroleum*, 339 NLRB 916 (2003).

Finally, there is no credible evidence that Tovar falsified his employment application. Respondent obtained information, after Tovar's discharge that contradicted his stated employment history. However, Tovar disputed that hearsay information and testified that his employment application was correct. Respondent cannot rely on the information it obtained in April to justify the unlawful termination of Tovar in January. See *Abbey's Transportation Service v. NLRB*, 837 F.2d 575, 581 (2d Cir. 1988) (employer's "shifting assertions" justifying discharge support inference of unlawful motivation); *Royal Development Co. v. NLRB*, 703 F.2d 363, 372 (9th Cir. 1983).

I have also considered whether Respondent's after-acquired knowledge of the discrepancy with the employment application satisfies the Board's after-acquired knowledge rule. Under this rule, "if an employer satisfies its burden of establishing that the discriminatee engaged in unprotected conduct for which the employer would have discharged any employee, reinstatement is not ordered and backpay is terminated on the date the employer first acquired knowledge of the misconduct." *Marshall Durbin Poultry Co.*, 310 NLRB 68, 70 (1993), enfd. in pertinent part 39 F.3d 1312 (5th Cir. 1994), and *John Cuneo, Inc.*, 298 NLRB 856, 856-857 (1990). As stated earlier, the only evidence that Tovar falsified his employment application is unreliable hearsay. On the other hand, Tovar, the only witness with knowledge, testified that his application was correct. The burden of proof is on Respondent and Respondent has not met that burden. Accordingly, I find that Respondent's contention must be dismissed, and normal reinstatement and backpay remedies shall be recommended. *Music Exp. East*, 340 NLRB No. 129 (2003).

In sum, the General Counsel has shown that the discharge of Tovar on January 8, 2004, had been unlawfully motivated. Further, I find that the reasons advanced by Respondent for Tovar's discharge were inconsistent, contradictory, uncorroborated by available witnesses, undocumented or falsely documented and accordingly pretextuous. Therefore, I find that Respondent's discharge of Tovar violated Section 8(a)(3) and (1) of the Act.

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By threatening employees that they would be discharged for engaging in union activities, and by threatening that Respondent would close its facilities to avoid unionization, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

4. By discharging Joseph Michael Tovar because of his perceived union activities, Respondent violated Section 8(a)(3) and (1) of the Act.

5. The above unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that Respondent engaged in unfair labor practices, I find that it must be ordered to cease and desist therefrom and to take certain affirmative action to effectuate the policies of the Act.

The Respondent having discriminatorily discharged Joseph Michael Tovar, it must offer him full and immediate reinstatement to the position he would have held, but for his unlawful discharge. Further, Respondent shall be directed to make Tovar whole for any and all loss of earnings and other rights, benefits and privileges of employment he may have suffered by reason of Respondent's discrimination against him, with interest. Backpay shall be computed in the manner set forth in *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as provided in *New Horizons for the Retarded*, 283 NLRB 1173 (1987); See also, *Florida Steel Corp.*, 231 NLRB 651 (1977) and *Isis Plumbing Co.*, 139 NLRB 716 (1962).

Respondent must also be required to expunge any and all references to its unlawful discharge of Tovar from its files and notify Tovar in writing that this has been done and that the unlawful discharge will not be the basis for any adverse action against him in the future. *Sterling Sugars, Inc.*, 261 NLRB 472 (1982).

Upon the foregoing findings of fact and conclusions of law, and upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[13]

[13] All motions inconsistent with this recommended order are hereby denied. In the event no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

Respondent, Central Freight Lines, Inc., its officers agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging employees in order to discourage union activities.

(b) Threatening employees with discharge, or other retaliation for engaging in union activities

(c) Threatening employees with the closure of its terminal , or other retaliation for engaging in union activities.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer reinstatement to Joseph Michael Tovar to the position he would have held, but for his unlawful discharge.

(b) Make whole Joseph Michael Tovar for any and all losses incurred as a result of Respondent's unlawful discharge of him, with interest, as provided in the Section of this Decision entitled "The Remedy".

(c) Within 14 days from the date of this Order, expunge from its files any and all references to the discharge of Joseph Michael Tovar and notify him in writing that this has been done and that Respondent's discharge of him will not be used against him in any future personnel actions.

(d) Preserve, and within 14 days of a request make available to the Board or its agents for examination and copying, all payroll records, timecards, social security payment records, personnel records and reports, and all other records necessary to determine the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its Mira Loma, California, facilities copies of the attached Notice marked "Appendix".[14] Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by Respondent's authorized representative, shall be posted for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure the notices are not altered, defaced or covered by other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own

[14] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

expense, a copy of the attached notice to all current employees and former employees employed by the Respondent at any time since January 8, 2004.

(f) Within 21 days after service by the Region, file with the Regional Director, a sworn certification of a responsible official on a form provided by the Region attesting to the steps Respondent has taken to comply.

Dated, San Francisco, California, October 25, 2004.

_____
Jay R. Pollack
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT discharge employees in order to discourage union activities.

WE WILL NOT threaten employees with discharge or threaten to close our terminals in order to discourage union activities.

WE WILL NOT in any like or related manner interfere with, restrain or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer reinstatement to Joseph Michael Tovar to the position he would have held, but for his unlawful discharge.

WE WILL make whole Joseph Michael Tovar for any and all losses incurred as a result of our unlawful discharge of him, with interest.

WE WILL expunge from our files any and all references to the discharge of Joseph Michael Tovar and notify him in writing that this has been done and that the fact of his discharge will not be used against him in any future personnel actions.

Central Freight Lines, Inc.
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

888 South Figueroa Street, 9th Floor, Los Angeles CA 90017-5449

(213) 894-5200, Hours: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (213) 894-5229.